No. 88-1868

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES, *et al.*,
Petitioners,
v.
WILLIAM VAN NOTE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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ARGUMENT

1. The significance of the opposing brief lies in its total failure to justify converting the expansive "relating to" language employed by Congress in § 18(b) of the OSH Act, 29 U.S.C. § 667(b) (169a), into a "purpose" test and simultaneously eliminating OSHA's primary role in the statutory preemption scheme. Respondents do not even make a pass at such a showing. Nor do they make any effort to refute our demonstration that the "purpose" test would facilitate wholesale circumvention of the preemptive effect of the hazard communication standard and, for that matter, virtually any workplace standard promulgated by OSHA. Indeed, respondents specifically confirm the semantic nature of the test, and the ease with which it can be manipulated, by urging (at 8) that a state or municipality may escape federal preemption sim-

ply by characterizing its regulation of workplace conditions as something other than "occupational."

Faced with this Court's strong admonition in ERISA cases that allowing preemption to turn upon a state's "purpose" would open the door wide to circumvention (*see* Petition at 17), respondents assert (at 10) that this Court described the ERISA statutory provision as "virtually unique" in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n. 26 (1983). But as the Court's discussion plainly shows, the Court was referring to ERISA having authorized the federal courts to fashion a body of federal common law to govern rights and duties under private pension plans, not to the "relating to" language that Congress consciously chose as the test of preemption in both ERISA and the OSH Act.[1] The Court's observation would not, in any event, detract from the common sense and precedential force of the Court's devastating critique of the "purpose" test, or from the necessity of granting certiorari to resolve the issue under the OSH Act.

The weakness of respondents' position is only highlighted by their heavy reliance upon *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). As we noted in our Petition (at 17), the statute at issue in *Pacific Gas* specifically directed a "purpose" test. *See* 461 U.S. at 210. In other words, when Congress wishes to preempt according to purpose, it knows how to do so. But whatever test Congress adopts, the courts must apply it.[2]

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[1] It is, we submit, simply bewildering that the court in *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 56 (2d Cir. 1988), could have missed the clear implications of its own observation that "[t]he only textual affinity that section 18 holds with ERISA's preemption provision is the use of the word 'related' . . . ."

[2] The Court, in *Pacific Gas*, recognized the "unsatisfactory" nature of a purpose test and the ease with which it could be manipulated to avoid preemption. *See* 461 U.S. at 216.

2. In the amicus brief filed in *Manufacturers Ass'n of Tri-County v. Knepper*, No. 86-1102, the Solicitor General urged that the proper inquiry is whether a state law relates in either "purpose *or* effect" to the matters addressed in the federal standard. *See* Petition at 18-19.[3] Respondents, however, assert that the government has vacillated and that the deliberate, focused statement of position submitted to this Court by the Solicitor General was somehow "displaced" by a single reference in the preamble to the 1987 amendments to the hazard standard. *See* Opposition at 20-21. Respondents, of course, have their chronology backwards. The Solicitor General's amicus brief came *after*, not before, the 1987 amendments and even cited to the latter. *See, e.g.*, Amicus Brief at 15.[4]

Should the Court feel the need, it could, of course, again solicit the government's views as was done in *Knepper*. We note, in this connection, that the purely prudential reasons suggested by the Solicitor General in *Knepper* for "postponing" review of the Third Circuit's "purpose" test no longer obtain. *See* Petition at 18-19.

CONCLUSION

Respondents' opposition confirms the serious impact of this case upon the OSH Act's preemption scheme and the need for this Court to review the dangerously distorted state of preemption law resulting from the Third Circuit's decisions. Absent such review, the "purpose" test

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[3] In their footnote 7 (at 21) and elsewhere, respondents garble the distinction between a relation "in effect" to the federal standard, such as we have here, and the adverse "effects" that must be demonstrated for "implied" preemption.

[4] Moreover, even the court of appeals recognized in *Hughey II* that the 1987 amendments were "minimal" and did not affect the statutory "relating to" preemption test. *See New Jersey Chamber of Commerce v. Hughey*, 868 F.2d 621, 623, 625 (3d Cir. 1989) (6a, 11-12a).

will continue to dominate the field and the statutory preemption provision will be a dead letter.

Respectfully submitted,

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